

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the matter of )  
 )  
WAHPETON SCHOOL DISTRICT ) File No. 0002831316  
 )  
Application for Renewal of License for )  
Educational Broadband Service Station WNC573 )  
 )

ORDER ON RECONSIDERATION

Adopted: May 26, 2010

Released: May 27, 2010

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Order on Reconsideration*, we dismiss a petition for reconsideration and related informal objection of a grant of a late-filed application to renew an Educational Broadband Service (EBS) license.

II. BACKGROUND

2. On November 28, 2006, Wahpeton School District (Wahpeton) filed a renewal application and a request to waive Section 1.949 of the Commission’s Rules to permit it to untimely file an application to renew the authorization for EBS Station WNC573, which had expired on March 23, 2005.<sup>1</sup> Wahpeton stated that it let its authorization expire because its lessee had declared bankruptcy and ceased operations.<sup>2</sup> Wahpeton decided to renew its authorization when another company expressed interest in leasing Wahpeton’s excess capacity.<sup>3</sup> On December 28, 2006, Wahpeton amended the Renewal Application.<sup>4</sup> Public notice of the filing of Wahpeton’s Renewal Application, as amended, was given on January 3, 2007.<sup>5</sup> Petitions to deny and other objections were due by February 2, 2007.<sup>6</sup> No petitions to deny or other objections were filed during that period. On February 13, 2007, the Renewal Application was granted.<sup>7</sup>

<sup>1</sup> File No. 0002831316 (Renewal Application).

<sup>2</sup> Renewal Application, Waiver Request (filed Nov. 26, 2006) at 1.

<sup>3</sup> *Id.*

<sup>4</sup> Renewal Application, Amendment (filed Dec. 28, 2006).

<sup>5</sup> See Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 2802, *Public Notice* (WTB rel. Jan. 3, 2007) at 2.

<sup>6</sup> See 47 C.F.R. § 1.939(a)(2).

<sup>7</sup> See Wireless Telecommunications Bureau Market-Based Applications Action, Report No. 2940, *Public Notice* (WTB rel. Feb. 21, 2007) at 2.

3. On March 22, 2007, Sprint Nextel filed a motion seeking to designate this proceeding, among others, as “permit but disclose” for the purposes to the Commission’s *ex parte* rules.<sup>8</sup> On March 23, 2007, Sprint Nextel Corporation (Sprint Nextel) filed a petition seeking reconsideration of the Division’s decision granting Wahpeton’s Renewal Application.<sup>9</sup> Sprint Nextel maintains that the Division erred in granting the Renewal Application because Wahpeton’s authorization to operate Station WNC573 automatically cancelled when Wahpeton failed to timely file a renewal application.<sup>10</sup> Because the license for Station WNC573 automatically cancelled, Sprint Nextel argues, it cannot be renewed.<sup>11</sup> Moreover, Sprint Nextel continues, the Division’s decision amounted to a new authorization in violation of the competitive bidding procedures in Section 309(j) of the Communications Act, thus taking money from the U.S. Treasury.<sup>12</sup> Sprint Nextel further argues that the Division’s decision effectively modifies the licenses of Station WNC573’s co-channel and adjacent channel licensees by causing them to suffer interference from Station WNC573 and, in the case of co-channel licensees, having to “split the football.”<sup>13</sup> Sprint Nextel claims to have a “direct and immediate interest” in this proceeding.<sup>14</sup> Sprint Nextel further claims that the Division’s decision harms Sprint Nextel network deployment of 4G services and it delays the transition process.<sup>15</sup> Wahpeton did not file an opposition. On July 10, 2007, Sprint Nextel, Nokia, Inc. and Nokia Siemens Networks, Inc. filed an informal objection directed against the Renewal Application.<sup>16</sup>

### III. DISCUSSION

#### A. Petition for Reconsideration and Informal Objection

4. We dismiss the Petition because Sprint Nextel fails to meet the Commission’s requirements for entering the proceeding for the first time at reconsideration stage. As a result, we need not make a determination on the merits of Sprint Nextel’s Petition.

5. Section 1.106(c) of our rules provides that, if a party that has not hitherto participated in a proceeding chooses to file a petition for reconsideration, the petition may only be granted if (1) the petition relies on events which have occurred or circumstances which have changed since the last opportunity to present such matters, (2) the petition relies on facts unknown to the petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity, or (3) consideration of the facts relied on is in the public interest.<sup>17</sup>

6. Sprint Nextel’s Petition did not rely on facts unknown to it until after Sprint Nextel’s last opportunity to present such matters that could not, through the exercise of ordinary diligence, have been

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<sup>8</sup> Request to Designate Proceedings as “Permit but Disclose,” Sprint Nextel Corporation (filed Mar. 22, 2007) (*Ex Parte* Motion).

<sup>9</sup> Petition for Reconsideration of Sprint Nextel Corporation (filed Mar. 23, 2007) (Petition).

<sup>10</sup> *Id.* at 1-3.

<sup>11</sup> *Id.* at 4-8.

<sup>12</sup> *Id.* at 10-13.

<sup>13</sup> *Id.* at 15-19.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* at 19-21.

<sup>16</sup> Letter from Trey Hanbury, Director, Government Affairs, Sprint Nextel Corporation and Cecily Cohen, Director, Government and Industry Affairs, Nokia and Nokia Siemens Networks to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission (Jul. 10, 2007) (Informal Objection).

<sup>17</sup> 47 C.F.R. §§ 1.106(b)(2), (c).

learned prior to such opportunity. In 2007, American Telecasting of Minnesota, LLC. was controlled by Sprint Nextel. Sprint did not file a petition to deny or other objection when the Renewal Application was filed. Accordingly, the Sprint Nextel Petition does not comply with Section 1.106(c) of the Commission's Rules.

7. Additionally, pursuant to Section 1.106(b)(1) of the Commission's Rules, a petitioner must show good reason why it was not possible for it to participate in the earlier stages of the proceeding.<sup>18</sup> Sprint Nextel does not explain why it failed to participate earlier in Wahpeton's renewal proceeding. Parties cannot be allowed "to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed."<sup>19</sup> Accordingly, the Petition does not meet the requirements of Section 1.106(b)(1) of the Commission's Rules.

8. We further conclude that consideration of Sprint Nextel's Petition would not be in the public interest because Sprint Nextel has failed to demonstrate standing. To establish party in interest standing, a petitioner must allege facts sufficient to demonstrate that grant of the subject application would cause it to suffer a direct injury.<sup>20</sup> In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.<sup>21</sup> Sprint Nextel does not hold a cognizable interest in the frequencies in question because Sprint Nextel is not eligible to be licensed on these EBS channels.<sup>22</sup> Accordingly, we review Sprint Nextel's other arguments to determine whether it has demonstrated a cognizable interest in denial of these applications.

9. Sprint Nextel's general allegations concerning network deployment are insufficient to establish that it has any cognizable interest in the instant Application.<sup>23</sup> Sprint Nextel provides no information concerning when it may offer service in the area at issue, whether it intends to use frequencies adjacent to the frequencies covered by the licenses in question, and what difficulties it would face as a result of a grant of the instant Application. Moreover, while Sprint Nextel could be correct in the abstract that the grant of a late-filed renewal application could complicate network planning under certain circumstances, it has not attempted to demonstrate that a grant of the instant Renewal Application would cause such complications. Accordingly, Sprint Nextel's vague and general claims are insufficient to establish standing.

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<sup>18</sup> 47 C.F.R. § 1.106(b)(1) states: "If the petition [for reconsideration] is filed by a person who is not a party to the proceeding, it . . . shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."

<sup>19</sup> *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

<sup>20</sup> See *AT&T Wireless PCS, Inc., Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000) (*AT&T Wireless*) (citing *Sierra Club v. Morton*, 405 U.S. 727, 73 (1972); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (1988)).

<sup>21</sup> *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3 (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59, 72, 78 (1978)).

<sup>22</sup> Section 27.1201 of the Commission's rules provides, in relevant part, that a license for an Educational Broadband Service station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended. 47 C.F.R. § 27.1201.

<sup>23</sup> Petition at 19-20.

10. Furthermore, Sprint Nextel's argument that granting Wahpeton's Renewal Application would impede the transition is unsubstantiated and contrary to the available evidence.<sup>24</sup> We first note that this argument could only apply in a market where Sprint had filed to be the proponent before Wahpeton filed its renewal Application. Our records indicate that Sprint has not filed to be the transition proponent for BTA 138 where Wahpeton's Geographic Service Area (GSA) is located.<sup>25</sup> Finally, Sprint Nextel has failed to show that it would suffer harm from interference or from its lessee's loss of geographic service area. With respect to generalized interference concerns, Sprint Nextel has not shown how the new technical rules adopted for BRS and EBS, which Sprint has mostly supported, will be insufficient to protect Sprint Nextel's operations. Furthermore, Sprint Nextel has not provided engineering analyses to support its generalized interference concerns.<sup>26</sup>

11. To the extent that Sprint Nextel's concerns are based on its lessees losing service area because they are forced to "split-the football" with licenses that have been reinstated, that concern does not apply here. On March 18, 2008, the Commission adopted a *Declaratory Ruling* relieving licensees from having to "split the football" in certain circumstances.<sup>27</sup> Those circumstances do not apply in this case because Wahpeton's license was in active status on January 10, 2005, the date the "splitting the football" process occurred, as required by the *BRS/EBS Report and Order*.<sup>28</sup> Consequently, the geographic overlap between the Wahpeton and Fargo Public Schools (licensees of WNC478) and Wahpeton and Minnesota Public Radio (licensee of WHR765) was split on January 10, 2005. In other words, even if Wahpeton's Renewal Application was denied, the GSAs of Station WNC478 and WHR765 would not be restored to their pre-January 10, 2005 boundaries. Therefore, Sprint has not shown that it or its licensees/lessors are harmed by the renewal of the license Station WNC573.

12. We also dismiss the Informal Objection. Sprint Nextel's Petition cannot be considered because it failed to participate at an earlier stage in the proceeding. The Commission's procedural rules regarding petitions for reconsideration would have no meaning if a party could circumvent those rules by filing an informal objection months after the deadline for petitions for reconsideration. While Nokia also signed the pleading, Nokia also fails to explain its failure to participate in a timely fashion in the proceeding and makes no serious attempt to demonstrate standing. We therefore dismiss the Informal Objection.

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<sup>24</sup> *Id.* at 20-21.

<sup>25</sup> Our records indicate that Sprint Nextel has not filed to be the proponent in the BTA 138 (Fargo, North Dakota). Clearwire, the BTA holder of BTA 138 has filed a self-transition notification for BTA 138. Wahpeton has not filed a self-transition notification. See WT Docket No. 06-136.

<sup>26</sup> At the petition for reconsideration stage, the Commission requires that interference claims be supported an affidavit from an engineer. 47 C.F.R. § 1.106(e).

<sup>27</sup> On March 18, 2008, the Commission adopted a declaratory ruling clarifying its policy concerning the division of overlapping geographic service areas (GSAs) between active EBS licensees and EBS licensees whose licenses expired prior to January 10, 2005 but are later reinstated. In this case, however, Wahpeton's license for Station WNC573 was active on January 10, 2005. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6053-6060 ¶¶ 161-179 (2008).

<sup>28</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14192-14194 ¶¶ 60-65 (2004).

**B. Ex Parte Motion**

13. Sprint Nextel argues that the “broad, important public policy issues” raised by the Wahpeton Application and the reinstatement of the 41 late-filed renewal applications and other similar applications justifies “permit-but-disclose” treatment of these applications under the Commission’s *ex parte* rules.<sup>29</sup> It also contends that changing the *ex parte* status of these proceedings would allow the Commission to develop a more complete record and provide the opportunity to meet with all parties to explore an appropriate resolution to this proceeding.<sup>30</sup>

14. We deny Sprint Nextel’s request because we do not believe that changing the *ex parte* status of this proceeding will assist the Commission in the resolution of the instant Renewal Application. Sprint Nextel has had a full opportunity to make its arguments in its pleadings, and it fails to explain what additional information it could provide in meetings that it did not provide in its pleadings.

**IV. CONCLUSION AND ORDERING CLAUSES**

15. For the reasons discussed above, we conclude that Sprint Nextel’s Petition does not comply with Section 1.106(c) of the Commission’s Rules. We further conclude that Sprint Nextel lacks standing to file the Petition. Accordingly, we dismiss Sprint Nextel’s Petition and the Informal Objection. We also deny Sprint Nextel’s request to designate this proceeding as “permit but disclose” for the purposes to the Commission’s *ex parte* rules.

16. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by Sprint Nextel Corporation on March 23, 2007 IS DISMISSED.

17. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission’s Rules, 47 C.F.R. § 1.41, that the informal objection filed by Sprint Nextel Corporation, Nokia, Inc. and Nokia Siemens Networks, Inc. on July 10, 2007 IS DISMISSED.

18. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.1200(a) of the Commission’s Rules, 47 C.F.R. § 1.1200(a), that the Request to Designate Proceedings as “Permit but Disclose” filed by Sprint Nextel Corporation on March 22, 2007 IS DENIED with respect to File No. 0002831316.

19. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble  
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Wireless Telecommunications Bureau

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<sup>29</sup> *Ex Parte* Motion at 2.

<sup>30</sup> *Ex Parte* Motion at 2-3.